
Federation of Law Societies
of Canada



Fédération des ordres professionnels
de juristes du Canada

**Submission of the
Federation of Law Societies of Canada
to the
Canada Border Services Agency**

***Notice of Intent to Develop Examination of
Documents Stored on Personal Digital
Devices Regulations***

Ottawa, April 14th, 2022

INTRODUCTION

1. The Federation of Law Societies of Canada (the “Federation”), on behalf of its member law societies, appreciates the opportunity to provide comments to the Canada Border Services Agency (“CBSA”) regarding the development of regulations under the *Customs Act* to prescribe legally-binding controls on the examination of documents stored on a personal digital device (“PDD”).
2. The Federation is the coordinating body of the 14 regulators of the legal profession in Canada. Our member law societies are charged by legislation in each province and territory with the responsibility for regulating more than 136,000 lawyers, 4,200 notaries in Quebec and Ontario’s nearly 10,600 licensed paralegals in the public interest. An important role of the Federation is to express the views of the law societies on national and international issues relating to the administration of justice and the rule of law. This has resulted in the Federation developing an established history of advocating for robust protection of solicitor-client privilege and the independence of the legal profession.

SUBMISSIONS

3. According to the CBSA *Customs Notice 22-07: Regulations for the Examination of Documents Stored on Personal Digital Devices Made Pursuant to the Customs Act*¹ the proposed regulations would “prescribe requirements for conducting examinations of personal digital devices by designated CBSA officers”. The regulations would not propose any policy changes but “only enshrine existing policy into regulation” including on the “handling of solicitor client privilege information”. The CBSA intends for the regulations to come into force at the same time as related legislative changes to the *Customs Act* under Bill S-7, introduced in the Senate on March 31st, 2022.
4. The Federation supports the government’s stated objectives of increasing transparency and reinforcing privacy protections by prescribing CBSA policy controls to make them accessible and legally-binding. However, it is the Federation’s view that the existing CBSA policies provide inadequate protections for information protected by solicitor-client privilege that is stored on PDDs. Enshrining these policy controls into regulation will not address the problem. It is the Federation’s position that the CBSA policy and the proposed regulations must set out constitutionally compliant steps for CBSA Border Services Officers (“BSO”) to take when a claim of solicitor-client privilege is asserted over a PDD, or information contained on it.
5. In correspondence dated April 20, 2018 to the Minister of Public Safety, the Federation raised concerns about the lack of protection for solicitor-client privilege in the CBSA *Operational Bulletin PRG-2015-06-30*, which provides guidelines on the examination of PDD and content by officers. The policy states that PDD, media and digital documents are classified as “goods”. Under section 99 of the *Customs Act*, CBSA officers are permitted to examine goods for customs purposes only. The policy made no reference to devices or information that may be the subject of a claim of solicitor-client privilege. The only privacy safeguard evident from the policy is that “examinations should not be conducted as a matter of routine; they may only be conducted if there is a multiplicity of indicators that evidence of

¹ CBSA, <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn22-07-eng.html>.

contraventions may be found on the digital device or media”. If a PDD is to be searched, CBSA officers are required to explain their reasoning and how the information searched may reasonably be expected to confirm or refute security concerns. In the Minister’s response to the Federation dated June 20, 2018, he advised that the CBSA policy outlined procedures on handling documents where solicitor-client privilege has been claimed without providing details of the procedures or a copy of the policy.

6. The CBSA website includes the information below on how BSOs are to respond when they encounter information labelled “solicitor-client privileged” on a PPD during a search. We understand this represents the current CBSA policy intended to be enshrined in regulation under the proposal:

Solicitor-client privileged information

The CBSA is committed to respecting privacy rights while protecting the safety and security of the Canadian border. If a BSO encounters content marked as solicitor-client privilege, the officer must cease inspecting that document. If there are concerns about the legitimacy of solicitor-client privilege, the device can be set aside for a court to make a determination of the contents.²

7. While some policy consideration has been given to the protection of solicitor-client privilege, the protection is inadequate. Solicitor-client privilege does not apply only to information and documents that are labelled as such. Solicitor-client privilege encompasses information exchanged for the purpose of giving or receiving legal advice – this includes basic personal information about clients.
8. The Supreme Court of Canada has stated on a number of occasions that solicitor-client privilege is a fundamental right essential to the rule of law and the privilege must be as close to absolute as possible to ensure that clients communicate openly and confidently with their legal counsel.³ The Supreme Court has also made it clear that any infringement on solicitor-client privilege must be justified by an absolute necessity and must minimally impair the privilege. The Supreme Court has also held that recourse to the courts is the appropriate resolution to disputes over whether information or documents are protected by solicitor-client privilege. In *Lavallee v. Canada (Attorney General)*⁴, the Supreme Court outlined guidelines that apply to searches of law offices that contain solicitor-client privileged information, which courts have recognized to apply to “any place where privileged documents may reasonably be expected to be located.”⁵ It is the Federation’s view that

² CBSA, *Examining Digital Devices at the Canadian border*, <https://www.cbsa-asfc.gc.ca/travel-voyage/edd-ean-eng.html>.

³ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 (CanLII), *Canada (Privacy Commissioner) v. Blood Tribe Department*, 2008 SCC 44 (CanLII).

⁴ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R v Fink*, 2002 SCC 61 (CanLII) (“*Lavallee*”).

⁵ *Festing v. Canada (Attorney General)*, 2003 BCCA 112 (CanLII) at para. 24: “After considering a variety of wording suggested by counsel, we conclude that the words “law office” should be interpreted for the purpose of applying the *Lavallee* guidelines as including: “any place where privileged documents may reasonably be expected to be located”. This definition would include, for example, a lawyer’s home, a lawyer’s office in multi-disciplinary business premises; the office of in-house counsel for a business, and storage facilities where lawyers store their files. The Court offers these examples as just that — examples

these guidelines include a legal professional's PDD where a claim of solicitor-client privilege has been made whether that claim is communicated verbally or in writing.

9. The existing CBSA policy does not provide adequate protection for the fundamental right of solicitor-client privilege. It is the Federation's view that the current measures and controls that apply only to information and documents explicitly marked as solicitor-client privileged are too narrow and fail to comply with the regime laid out by the Supreme Court in *Lavallee*.
10. It is the Federation's position that the CBSA's policy must be revised so that it, and the proposed regulations, set out constitutionally compliant measures and controls for BSOs to follow when a claim of solicitor-client privilege is asserted over a PDD or its content. Following the principles outlined by the Supreme Court in *Lavallee*, the policy must, at a minimum, state that a search of a PDD be halted immediately when there is a claim that such a device or its content are protected by solicitor-client privilege. The policy and regulatory measures should also provide that any questions about the legitimacy of such a claim are to be referred to a court.
11. The Federation would welcome the opportunity to expand on the issues raised in this submission and to assist in ensuring that any proposed regulations provide adequate protection for solicitor client privilege.

of places where the *Lavallee* guidelines would apply. Counsel agree that there is little utility in attempting to define all such places since the practice of law, and the manner in which lawyers' store client information (for example, on computer hard drives and disks), continue to expand and diversify."

